

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)	
BENEFICIAL WATER USE PERMIT NUMBER 43C)	FINAL
11533100 BY LOIS E. EBERHART)	ORDER

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the November 1, 2002, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

The Application is DENIED.

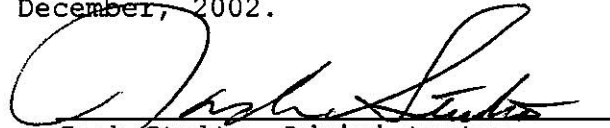
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the

Department will transmit a copy of the tape of the proceedings to the district court.

Dated this 24th day of December, 2002.



Jack Stults, Administrator
Water Resources Division
Department of Natural
Resources and Conservation
PO Box 201601
Helena, MT 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Final Order was served upon all parties listed below on this 23rd day of December, 2002 by First Class United States Mail.

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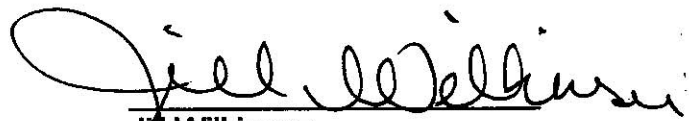
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BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NUMBER) PROPOSAL FOR DECISION
43C 11533100 BY LOIS E. EBERHART)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, and after notice required by Mont. Code Ann. §85-2-307, a hearing was held on October 21, 2002, in Columbus, Montana, to determine whether a beneficial water use permit should be issued to Lois E. Eberhart, hereinafter referred to as "Applicant" for the above applications under the criteria set forth in Mont. Code Ann. § 85-2-311.

APPEARANCES

Applicant appeared at the hearing in person and testified. Charlie Scherzberg, Art Arnold, Gordon Walter, and Gayle Haley testified for the Applicant.

Objector Todd Gahagan appeared at the hearing in person and testified.

Objector Robert Gahagan appeared at the hearing in person and testified.

Objector Lannen/Alstad appeared at the hearing through Betty Lannen. Marcus Arthun, lessee of Objector Lannen/Alstad property, testified for Objector Lannen/Alstad.

Keith Kerbel, Regional Office Manager of the Billings Water Resources Regional Office of the Department of Natural Resources and Conservation (Department), was called to testify by the Hearing Examiner.

EXHIBITS

Applicant offered exhibits for the record. The exhibits are admitted into the record to the extent noted below.

Applicant offered eight exhibits for the record. The Hearing Examiner accepted and admitted into evidence Applicant's Exhibits A1-8.

Applicant's Exhibit A1 is a photograph of the Fishtail Ditch.

Applicant's Exhibit A2 is a photograph of the Fishtail Ditch.

Applicant's Exhibit A3 is a photograph of the Fishtail Ditch.

Applicant's Exhibit A4 is a photograph of the Fishtail Ditch.

Applicant's Exhibit A5 is a photograph of the Fishtail Ditch.

Applicant's Exhibit A6 is a one-page statement read at the hearing by Applicant.

Applicant's Exhibit A7 consists of a two-page copy of *Monthly Streamflow Statistics for Montana, USGS 06204050 West Rosebud near Roscoe MT* from the USGS website.

Applicant's Exhibit A8 is a one-page copy of USGS October 2000 through September 2001 discharge measurements for West Rosebud Creek 2 miles downstream from Mystic Lake, and 13.5 miles southwest of Roscoe, Montana.

Objectors offered no exhibits for the record.

PRELIMINARY MATTERS

The Parties stipulated that the possessory interest criterion is not an issue.

Objector Betty Lannen appeared at the hearing and introduced Marcus Arthun, lessee of Objector Alstad/Lannen property. Objector Betty Lannen remained at the hearing, with Mr. Arthun as her spokesperson.

Applicant desires to obtain a water right for a purported historic use of water which was not claimed in the state-wide water adjudication. The adjudication claims filing period is now closed,

Mont. Code Ann. § 85-2-221(4), so a permit application is the only way to now acquire a protectable water right to use surface water for this proposed use that was unclaimed in the adjudication.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

General

1. Application for Beneficial Water Use Permit 43C 11533100 in the name of and signed by Lois E. Eberhart was filed with the Department on June 27, 2001. (Department file)
2. The Environmental Assessment (EA) prepared by the Department for these applications was reviewed and is included in the record of this proceeding.
3. Applicant seeks to appropriate 50 gallons per minute (gpm) up to 2.5 acre-feet of water per year from West Rosebud Creek, a tributary of the Rosebud River. The water is to be diverted at the Fishtail Town Ditch at a point in the SE~~4~~NW~~4~~NE~~4~~ of Section 33, Township 4 South, Range 18 East, Stillwater County, Montana. The proposed means of diversion is an existing headgate. The proposed period of diversion is May 1 through September 30, inclusive of each year. The proposed use is lawn and garden irrigation. The proposed place of use is 1 acre located in the NE~~4~~SE~~4~~SE~~4~~ of Section 28, Township 4 South, Range 18 East, Stillwater County, Montana. (Department file)

Physical Availability

4. Applicant provided copies of United States Geologic Survey (USGS) records for a stream gage on West Rosebud Creek located 15 miles upstream of the proposed point of diversion. These records show monthly mean flows for the period 1966 through 2001 of May, 16.2 cfs; June, 76.5 cfs; July, 158 cfs; August, 103 cfs; 38.5 September, cfs. Applicant has no knowledge how much this gauged flow is reduced by

existing appropriations between the gage and proposed point of diversion. (Department file, testimony of Gayle Hayley)

5. The existing Woodard Ditch, however, directly downstream of the Fishtail Town Ditch has always had water available at its headgate and has not been without water during the proposed period of appropriation, so water flowing to the Woodard Ditch would be physically available at Applicant's proposed point of diversion. (Department file, testimony of Todd Gahagan)

Legal Availability

6. Applicant did not identify the existing legal demands on West Rosebud Creek. (Department file)

7. Applicant did not provide an analysis of the evidence on physical availability and the existing legal demands on the source. Here physical availability was shown only by USGS gauge records 15 miles upstream from the proposed point of diversion and with no legal demands on West Rosebud Creek identified. No analysis or comparison was provided. (Department file, testimony of Gayle Hayley)

8. Applicant provided a copy of Department records highlighting what appear to be rights on the Fishtail Town Ditch that Applicant proposes to use. The Fishtail Town Ditch can carry at least 3 cubic feet per second (cfs) according to a Department staff estimate. There was no analysis comparing the capacity of the Fishtail Town Ditch that Applicant proposes to use with the existing legal demands from the Fishtail Town Ditch. (Department file, testimony of Keith Kerbel)

Adverse Effect

9. Applicant will use an existing headgate on West Rosebud Creek to divert the requested water into the Fishtail Town Ditch. Applicant will use a siphon until a pump is purchased to divert water from the Fishtail Town Ditch where the ditch passes through the proposed place of use. Applicant plans to shut off or cease irrigating when downstream uses are not satisfied. Applicant is aware her portion of the diversion at West Rosebud Creek and the secondary diversion from

Fishtail Town Ditch must be stopped if a downstream senior on West Rosebud Creek or on Fishtail Town Ditch makes a valid call. Applicant can control her use of water so water rights of a prior appropriator on West Rosebud Creek or Fishtail Ditch can be satisfied. (Department file, testimony of Applicant, Gayle Hayley, Keith Kerbel)

Adequacy of Appropriation Works

10. Applicant will use the existing Fishtail Town Ditch headgate and ditch to divert and convey water to the place of use. The Fishtail Town Ditch needs additional maintenance to make it adequate for use. The existing Fishtail Town Ditch has washed out and overflowed into the Woodard Ditch at times in the past. This caused sediment buildup in the Woodard Ditch which in turn caused the Woodard Ditch to wash out. (Testimony of Marcus Arthun)

11. The existing facilities require maintenance in addition to what has been performed already. Applicant will participate in maintenance activities with other ditch users to make the ditch usable again. The Fishtail Town Ditch capacity exceeds 3 cfs and the ditch has a lot of ditch loss. Any excess water diverted into the Fishtail Town Ditch is not returned to West Rosebud Creek; instead it flows into the downstream Woodard Ditch which Objectors use. Applicant's predecessors historically used water successfully from West Rosebud Creek via the Fishtail Town Ditch as Applicant proposes. The past use demonstrates the facilities were adequate at times in the past in spite of the lack of detailed information from Applicant regarding the capability of Fishtail Town Ditch to carry the requested water in addition to what existing Fishtail Town Ditch appropriators divert. The appropriation works are adequate to carry the requested water when the Fishtail Town Ditch is maintained to its original carrying capacity. (Department file, testimony of Applicant, Gayle Hayley, Charlie Scherzberg, Gordon Walter, Keith Kerbel)

Beneficial Use

12. The flow for the proposed use was determined by adding 20 gpm to the 30 gpm rate indicated in Department records by other Fishtail Town Ditch users. The 20 gpm is for ditch loss. The only time Applicant can exercise the requested right is when other Fishtail Town Ditch users are taking water. Without combining the carriage water of other Fishtail Town Ditch users, the requested amount will not make it from the Fishtail Town Ditch headgate on West Rosebud Creek to Applicant's secondary diversion from Fishtail Town Ditch. These amounts are reasonable when combined with carriage water of other Fishtail Town Ditch users. (Testimony of Keith Kerbel)

Possessory Interest

13. Applicant has a possessory interest in the place of use.
(Department file)

Water Quality Issues

14. No objections relative to water quality were filed against this application nor were there any objections relative to water classification or to the ability of a discharge permit holder to satisfy effluent limitations of his permit. (Department file.)

Based on the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction to issue a provisional permit for the beneficial use of water if the applicant proves the criteria in Mont. Code Ann. § 85-2-311 by a preponderance of the evidence. Mont. Code Ann. § 85-2-311(1).

2. A permit shall be issued if there is water physically available at the proposed point of diversion in the amount that the applicant seeks to appropriate; water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the

evidence on physical water availability and the existing legal demands, including but not limited to a comparison of the physical water supply at the proposed point of diversion with the existing legal demands on the supply of water; the water rights of a prior appropriator under an existing water right, a certificate, a permit, or a state reservation will not be adversely affected based on a consideration of an applicant's **plan** for the exercise of the permit that demonstrates that the applicant's use of the water will be controlled so the water right of a prior appropriator will be satisfied; the proposed means of diversion, construction, and operation of the appropriation works are adequate; the proposed use of water is a beneficial use; the applicant has a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use; and, if raised in a valid objection, the water quality of a prior appropriator will not be adversely affected, the proposed use will be substantially in accordance with the classification of water, and the ability of a discharge permitholder to satisfy effluent limitations of a permit will not be adversely affected. Mont. Code Ann. § 85-2-311 (1) (a) through (h).

3. The Applicant has proven that water is physically available at the proposed point of diversion in the amount Applicant seeks to appropriate, and in the amount requested. Mont. Code Ann. § 85-2-311(1)(a)(i). See Finding of Fact Nos. 4, 5.

4. The Applicant has not proven that water can reasonably be considered legally available. The application provided a Department report documenting the water rights data for the Fishtail Town Ditch, and a statement the Applicant knows she would have to cease irrigation if senior users are being adversely impacted. Applicant did not provide any analysis comparing water physically available in West Rosebud Creek with the legal demand from West Rosebud Creek as required by Mont. Code Ann. § 85-2-311. Assuming Applicant believed the analysis was only needed for the Fishtail Town Ditch, the record

contains only Department staff's testimony at hearing of a visual estimate of ditch capacity to show how much water the Fishtail Town Ditch will carry. No evaluation of how much of that capacity is already appropriated was made in the record. Mont. Code Ann. § 85-2-311(1)(a)(ii)(C) requires "a comparison of physical water supply at the proposed point of diversion with the existing legal demands on the supply of water." The lack of an analysis of existing demands on West Rosebud Creek or the Fishtail Town Ditch does not allow a conclusion that water is legally available in West Rosebud Creek or the Fishtail Town Ditch in spite of the fact water was historically used as requested prior to July, 1, 1973. Mont. Code Ann. § 85-2-311(1)(a)(ii). See Finding of Fact Nos. 6, 7, 8.

5. The Applicant has proven that the water rights of prior appropriators under existing water rights, certificates, permits, or state reservations will not be adversely affected. Mont. Code Ann. § 85-2-311(1)(b). See Finding of Fact No. 9.

6. The Applicant has not proven that the proposed means of diversion, construction, and operation of the appropriation works are adequate in their present condition. However, Applicant and other Fishtail Town Ditch users are doing ditch maintenance which when completed will make the diversion and operation of the Fishtail Town Ditch adequate. A condition to that effect makes the appropriation works adequate. Mont. Code Ann. § 85-2-311(1)(c). See Finding of Fact Nos. 10, 11.

7. The Applicant has not proven by a preponderance of evidence that the quantity of water proposed to be used is the minimum amount necessary for the proposed beneficial use. The amount requested is not sufficient to overcome ditch loss between the Fishtail Town Ditch headgate on West Rosebud Creek. However, when Applicant's use is made at times other Fishtail Town Ditch users are exercising their rights, Applicant's requested rate is adequate to make it to her secondary diversion point on Fishtail Town Ditch. A condition to that effect

makes the amount requested reasonable for the purpose proposed. Mont. Code Ann. §§ 85-2-311(1)(d), 312. See Finding of Fact No. 12.

8. The Applicant has a possessory interest in the property where water is to be put to beneficial use. Mont. Code Ann. § 85-2-311(1)(e). See, Finding of Fact No. 13.

9. No objection was raised as to the issue of water quality of a prior appropriator being adversely affected, the proposed use not being in accordance with a classification of water, or as to the ability of a discharge permit holder to satisfy effluent limitation of a permit. Mont. Code Ann. § 85-2-311(1)(f), (g), (h). See, Finding of Fact No. 14.

10. The Department cannot grant a permit to appropriate water unless the Applicant proves all of the 85-2-311 criteria by a preponderance of the evidence. Since Applicant has not proven water is legally available by a preponderance of the evidence, a permit may not be granted. See Confederated Salish and Kootenai Tribes v. Clinch, 1999 MT 342, ¶ 28, 297 Mont. 448, ¶ 28, 992 P.2d 244, ¶ 28.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

The Application is DENIED.

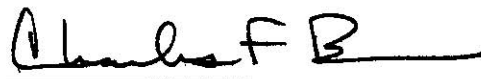
NOTICE

This Proposal for Decision may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions and a supporting brief with the Hearing Examiner and request oral argument. Exceptions and briefs, and requests for oral argument must be filed with the Department by November 21, 2002, or postmarked by the same date, and copies mailed by that same date to all parties.

Parties may file responses and response briefs to any exception filed by another party. The responses and response briefs must be filed with the Department by December 11, 2002, or postmarked by the same date, and copies must be mailed by that same date to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the above time periods, and due consideration of timely oral argument requests, exceptions, responses, and briefs.

Dated this 1st day of November, 2002.



Charles F Brasen
Hearings Officer
Water Resources Division
Department of Natural Resources
and Conservation
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Helena, Montana 59620-1601

CERTIFICATE OF SERVICE

This certifies that a true and correct copy of the Proposal for Decision was served upon all parties listed below on this 1st day of November, 2002 by First Class United States Mail.

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